

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementing Public Safety Broadband)	PS Docket No. 12-94
Provisions of the Middle Class Tax Relief and)	
Job Creation Act of 2012)	
)	
Implementing a Nationwide, Broadband,)	PS Docket No. 06-229
Interoperable Public Safety Network in the 700)	
MHz Band)	
)	
Service Rules for the 698-746, 747-762 and)	WT Docket No. 06-150
777-792 MHz Bands)	

COMMENTS OF THE STATE OF NEW MEXICO

The State of New Mexico (“SONM” or “New Mexico”) hereby submits the following in response to the Notice of Proposed Rulemaking (FCC 13-31, *rel.* March 8, 2013, “Notice”) in the above-captioned proceeding. The Commission seeks comment on proposals to implement provisions of the Middle Class Tax Relief and Job Creation Act of 2012.¹ It specifically asks what actions it should take in regard to First Responder Network Authority (“FirstNet”) spectrum within the State of New Mexico and elsewhere that is currently encumbered by the license of a non-operational commercial provider.² As detailed below, the Commission should terminate all commercial authorizations now licensed on D block spectrum pursuant to the statutory directive of Congress or, at a minimum, limit these operations to secondary status for the remainder of the license term. Immediate Commission action is necessary to meet the mandate of Congress under the Spectrum Act for a nationwide Public Safety Broadband

¹Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012) (“Spectrum Act”).

² Notice, at ¶ 47 and ¶ 59.

Network on specifically designated spectrum within the 700 MHz band and to allow New Mexico to move forward without any ambiguity as to spectrum rights under a lease with FirstNet for deployment of a critical public safety project.

Background

As a grant recipient of Broadband Opportunity Program (“BTOP”) funding SONM is currently concluding lease negotiations with FirstNet for the use of these funds in the development of FirstNet licensed spectrum in the State of New Mexico. Under the lease and with NTIA approval, SONM will be authorized to proceed with an early-builder project benefiting important public safety and national security interests in the State and indeed the Nation. However, in order for the FirstNet spectrum within New Mexico to be unambiguously available for development as part of the nationwide Public Safety Broadband Network as mandated by Congress under the Spectrum Act, the Commission should clear an existing, non-operational, commercial carrier from FirstNet licensed spectrum within New Mexico.

New Mexico has for several years been part of the effort to build a nationwide public safety broadband network and is continuing to play a vital role in this effort. In May 2010, SONM became a Commission-approved early builder waiver recipient, and was later authorized for early deployment of the New Mexico portion of the nationwide 700 MHz public safety broadband network under a statewide lease with the Public Safety Spectrum Trust (“PSST”).³ New Mexico then received a BTOP grant from NTIA for \$55 million, including a \$17 million state-funded match to pay for completing a digital upgrade of a statewide microwave backbone

³ See Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks, *Order*, PS Docket No. 06-229, 25 FCC Rcd 5145 (rel. May 12, 2010) (“Waiver Order”); *Also See* Public Safety and Homeland Security Bureau Approves Long Term De Facto Transfer Spectrum Lease Agreements filed by Conditional Waiver Recipients to Establish 700 MHz Interoperable Public Safety Wireless Broadband Networks, *Public Notice*, DA 10-1678 (rel. Sept. 2, 2010).

as well the initial deployment of 700 MHz public safety broadband service in the State. The total cash contribution from SONM for the BTOP grant project is \$5.4 million.

New Mexico was well on its way to achieving its 700 MHz public safety goals when the Spectrum Act was passed into law in February 2012 establishing FirstNet as the single public safety nationwide licensee over the existing public safety spectrum (763-769/793-799 MHz) and the adjacent D Block spectrum (758-763/788-793 MHz) for deployment of a nationwide Public Safety Broadband Network. In May 2012, following passage of the Spectrum Act, NTIA partially suspended BTOP funding to New Mexico and other BTOP recipients for “high risk” spending, such as the purchase of equipment, until FirstNet was in place. NTIA’s goal was to assure that grant dollars could be spent on facilities and equipment to be incorporated into FirstNet’s nationwide network, and on efforts yielding valuable data and information to guide FirstNet. The Commission followed by requiring all leases with the PSST to expire or be terminated on September 2, 2012.⁴ In taking this action, the Commission recognized that FirstNet, at the appropriate time, could consider going forward with early deployment projects pursuant to new lease agreements.⁵

In September 2012, acting on delegated authority, the Public Safety and Homeland Security Bureau (“PSHS Bureau” or “Bureau”) adopted rules authorizing FirstNet to be the single nationwide public safety license of the existing 700 MHz public safety spectrum and the

⁴ *Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, PS Docket No. 12-94, PS Docket No. 06-229, WT Docket No. 06-150, Order, FCC 12-85 (rel. July 31, 2012).

⁵ *Id.*, at ¶12.

700 MHz D Block spectrum as mandated by the Spectrum Act.⁶ Under the new Commission rules and “[p]ursuant to [the Spectrum Act], the 758-769 MHz and 788-799 MHz bands are allocated for use by the First Responder Network Authority to deploy a nationwide public safety broadband network as prescribed by statute.”⁷

Following FirstNet’s statutorily mandated licensing, one of the first actions by the FirstNet Board was to authorize negotiations with BTOP recipients, including the State of New Mexico, for use of BTOP funding under a lease agreement with FirstNet. Once projects are agreed upon and a lease is signed, FirstNet will recommend to NTIA a lifting of the partial suspension and deployment of the 700 MHz public safety broadband spectrum will go forward under these collaborative early builder projects.⁸ FirstNet and New Mexico are now in the final stages of completing a lease authorizing New Mexico’s use of FirstNet spectrum within the State. However, for this project to move forward without any ambiguity as to spectrum rights the Commission should now clear a non-operating commercial licensee from the public safety spectrum authorized to FirstNet by Congressional mandate.

⁶ *Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, PS Docket No. 12-94, PS Docket No. 06-229, WT Docket No. 06-150, Report and Order, DA 12-1462 (*rel.* September 7, 2012).

⁷ 47 C.F.R. §90.19 . *Also see* §90.532.

⁸ See “*FirstNet Board Charts Path Forward for BTOP Public Safety Projects*,” released February 12, 2013 at <http://www.ntia.doc.gov/press-release/2013/firstnet-board-charts-path-forward-btop-public-safety-projects>.

D Block Commercial Licenses Are Inconsistent With The Congressional Scheme Under The Spectrum Act And Should Be Terminated Or At A Minimum Limited To Secondary Status For The Duration Of The License Term.

PTPMS II, a commercial provider, is currently licensed in 761-763/791-793 D Block public safety spectrum in the El Paso-Albuquerque Major Economic Area (MEA) and in other parts of the country.⁹ The PTPMS II licenses in the EL-Paso-Albuquerque MEA cover almost the entire State of New Mexico and a portion of the State of Texas, along the Mexican border. PTPMS II has no existing operations and no customers.¹⁰ The statutorily designated public safety D Block spectrum is vital to FirstNet and the deployment of early builder projects within the State of New Mexico. Any commercial license in this public safety spectrum is clearly inconsistent with the Congressional scheme under the Spectrum Act. Pursuant to Congressional mandate the Commission should now terminate the PTPMS II licenses, or at a minimum, limit the authority of PTPMS II to secondary status for the remainder of its license term.

Even prior to passage of the Spectrum Act the Commission “found that allowing PTPMS II to operate indefinitely within the D Block was not in the public interest and that such operations would impede the provision of broadband public safety services.”¹¹ The Commission declined to provide a renewal expectancy and the PTPMS II licenses will expire in April 2015.¹² The Spectrum Act and the importance of this spectrum to FirstNet and New Mexico for an immediate public safety project within the State requires that the Commission now take further action to remove any uncertainty as to spectrum rights in the D block.

⁹ Notice, at ¶47.

¹⁰ Notice, at ¶59.

¹¹ *Id.*

¹² *Id.*

The Spectrum Act mandates that “[t]he Commission *shall* reallocate the 700 MHz D block spectrum for use by public safety entities.”¹³ It further requires that “Notwithstanding any other provisions of law... the Commission *shall reallocate* and grant a license to the First Responder Network Authority for the use of the 700 MHz D block spectrum and existing public safety broadband spectrum.”¹⁴ Congress also intends that “[t]he Commission *shall* take all actions necessary to facilitate the transition of the existing public safety broadband spectrum to the First Responder Network Authority.”¹⁵ These provisions of the Spectrum Act make clear that it is the will of Congress that commercial licenses in 700 MHz public safety spectrum are incompatible with the Congressionally mandated spectrum allocation and can no longer be authorized.

The Spectrum Act also directs FirstNet “to take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network.”¹⁶ FirstNet has now determined that the development of the public safety broadband network requires FirstNet to have the ability to support and collaborate on early builder public safety projects, such as the New Mexico project. A commercial authorization in this spectrum cannot be allowed to cloud the statutory directives of Congress and the immediate requirements of FirstNet.

The instant rulemaking allows the Commission to clear the 700 MHz public safety broadband spectrum of commercial authorizations pursuant to the public safety reallocation

¹³ *Spectrum Act*, at §6101.(emphasis added).

¹⁴ *Id.*, at §6201(a).

¹⁵ *Id.*, at §6201(c).

¹⁶ *See id.* § 6206(b).

mandate of Congress by shortening the license term of PTPMS II and terminating its licenses. In fact, in terminating the license of the PSST, the PSHS Bureau concluded that the Commission had no option but to terminate the license because it was inconsistent with the Congressional scheme that *only* FirstNet could be licensed in this spectrum. “The action that we are taking here to delete rules that form the basis of the PSST’s authority to hold its license and operate thereunder, along with the natural consequence of shortening the term of its license and eliminating any renewal expectancy, is *required* by the Public Safety Spectrum Act.”¹⁷

In terminating the PSST license on delegated authority, the Bureau further found that the “rulemaking process as the mechanism for carrying out this modification is appropriate, in that we are changing rules to reflect a clear statutory directive affecting the licensing regime for the public safety broadband spectrum, rather than basing our action on any concerns or other factors specific to the PSST or its administration of its license.”¹⁸ It concluded, “once the elimination of the rules establishing the authority under the PSBL becomes effective, we will take the ministerial step of deleting the PSST’s license from the Commission’s database.”¹⁹ The Commission should now take steps in the current rulemaking to terminate the license of PTPMS II, consistent with the Congressional mandate that the D block spectrum be reallocated for public safety use by FirstNet as the single licensee for this spectrum under the statute.

¹⁷ *Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, PS Docket No. 12-94, PS Docket No. 06-229, WT Docket No. 06-150, Report and Order, DA 12-1462 (*rel.* September 7, 2012), at §20 (*emphasis added*).

¹⁸ *Id.*

¹⁹ *Id.*

Even assuming *arguendo* that the Spectrum Act does not *require* the termination of the commercial licenses, the Commission should at a minimum, utilize this rulemaking to modify all commercial licenses operating in the D block and limit them to secondary status for the remainder of the license terms. It is well established that the Commission has broad authority to modify licenses in a rule making of general applicability. “[T]he Commission may modify licenses through notice and comment rulemaking proceedings.”²⁰ It is further recognized that “Licenses may be modified through rule making proceedings without affording parties an adjudicatory hearing, if the generic rules are otherwise procedurally and substantively valid.”²¹ Where a Commission policy is adopted based upon the general characteristics of a service, modification of licenses by rulemaking to implement that policy is appropriate.²²

For example, the Commission has previously used its rulemaking authority to modify broadcast licenses in order to limit hours of operation²³ and to modify cellular licenses to address service area boundaries.²⁴ As noted above, the Commission has already recognized that it was

²⁰ *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules.* MEMORANDUM OPINION AND ORDER ON RECONSIDERATION, 8 FCC Rcd 1363 (1993), at §4, (“Cellular Geographic Service Areas”) citing to: *UpJohn Co. v. Food and Drug Administration*, 811 F.2d 1583 (D.C. Cir. 1987) (*UpJohn*) (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)); *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966); *Amendment of the Rules With Respect to Hours of Operation of Standard Broadcast Stations*, 8 FCC 2d 698 (1967), affirmed, 10 FCC 2d 283 (1967), affirmed, *WBEN Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968), cert. denied, 393 U.S. 914 (1968) (*WBEN*).

²¹ *Cellular Geographic Service Areas*, at ¶4 (citation omitted).

²² *WBEN*, 396 F.2d at 618.

²³ *WBEN*, *Supra*.

²⁴ “Licensees of later authorized systems can thus compel the licensees of earlier authorized systems to ‘pull back’ extensions to a greater degree under the rules adopted in the Second Report than they could under the previous rules.” *Cellular Geographic Service Areas*, ¶18.

appropriate to modify the PSST license by rulemaking in light of the Congressional directives in the Spectrum Act. This same reasoning applies in the current situation because rules adopted in this proceeding are again designed to reflect a statutory directive affecting the licensing regime for the public safety broadband spectrum. Notice and comment followed by reasoned decision making in the current rulemaking is sufficient to allow the Commission to modify the commercial licenses.

In establishing the public safety broadband licensing scheme the Commission seeks to address a wide range of technical and regulatory issues of general applicability. Among these issues, is the status of existing commercial licenses in the D block. As noted, New Mexico believes that the Spectrum Act requires the termination of these licenses. Aside from termination, the best action that the Commission can take to implement the Congressional scheme is to limit the operations of all commercial licenses in the D block to non-interference “secondary” status for the remainder of the license term. It is well settled that the Commission has the authority to modify licenses based on *potential* interference and not just actual interference.²⁵ The public safety broadband licensing scheme calls out for preemptive Commission action to avoid even a remote chance of interference in situations involving safety to life and safety. Therefore, the Commission should further require that any commercial operations in the D block be conditioned on the commercial licensee *first* advising FirstNet of any plans to construct and operate.

By terminating or alternatively modifying all commercial licenses in the D block as proposed herein, the Commission will open the way without any ambiguity for FirstNet’s use of

²⁵ *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 46 (D.C. Cir. 2004). In upholding the Commission’s decision to delete an operating frequency from an existing license the Court found “the Commission’s modification served the public interest, even though the modification was based on potential rather than actual interference...” *Id.*, at 46.

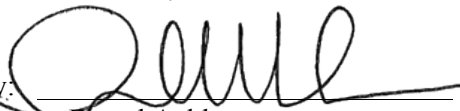
all public safety broadband spectrum allocated under the Spectrum Act as directed by Congress. It will also assist all early builder collaboration projects with FirstNet, such as the New Mexico project, that currently exist, or that may exist in the future to go forward in furtherance of the Congressional mandate for a nationwide public safety broadband network under a FirstNet license.

Conclusion

In view of the foregoing, the State of New Mexico respectfully requests that the Commission adopt rules and policies to promote the development of FirstNet licensed spectrum consistent with the views expressed herein.

Respectfully Submitted,

STATE OF NEW MEXICO
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